IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MELVIN LOCKETT,

Plaintiff,

v. CASE NO. 05-3209-SAC

JOSEPH NEUBAUER, et al.,

Defendants.

MEMORANDUM AND ORDER

This is a civil rights complaint, 42 U.S.C. 1983, filed by an inmate of the El Dorado Correctional Facility, El Dorado, Kansas (EDCF). Plaintiff proceeds in forma pauperis[1]. Because plaintiff is a prisoner, the court is required to screen and to dismiss the complaint or any portion thereof that is frivolous, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant immune from such relief. 28 U.S.C. 1915A(a) and (b).

CLAIMS

Plaintiff sues numerous defendants including the Kansas

[1] Plaintiff is again advised he remains obligated to pay the balance of the statutory filing fee of $250.00 in this action through payments from his inmate trust fund account as authorized by 28 U.S.C. 1915(b)(2). The Finance Office of the facility where he is incarcerated has been directed to collect from plaintiff's account and pay to the clerk of the court twenty percent (20%) of the prior month's income each time the amount in plaintiff's account exceeds ten dollars ($10.00) until the filing fee has been paid in full.

Department of Corrections (KDOC), the Kansas Secretary of Corrections (SOC), the Warden at EDCF, and Aramark Correctional Services, Inc., (hereinafter Aramark). Plaintiff complains that he and other inmates working for Aramark are receiving 40 to 60 cents per hour rather than minimum wage. He asserts Aramark is required by the Fair Labor Standards Act, 29 U.S.C. 201, et seq. (FLSA), to pay minimum wage. He alleges either Aramark pays less than required by the FLSA, or pays the proper amount to "revolving fund of KDOC/EDCF" who has then "distributed less than FLSA requires" to the inmate workers. He also claims defendants have "fixed the books" to show minimum wages are paid to inmates, he has not consented to the "keeping" of his minimum wage pay, and he is being subjected to slave labor in violation of the 13th Amendment. Plaintiff asserts defendants' denial of minimum wage is without due process and in violation of the equal protection clause. In addition to the FLSA, he cites Kansas regulations, civil rights statutes and constitutional provisions as legal authority for his claim.

As factual support, plaintiff alleges he began working for Aramark on September 11, 2002. He states that Aramark contracts with KDOC and EDCF. He also states that in 2004 his Aramark supervisor told him Aramark pays minimum wage to the EDCF/KDOC, who then pay "prison wages" to inmates. Plaintiff argues his prison employment is within the purview of the FLSA

because his employment records are maintained by and in the sole possession of Aramark. He further alleges Aramark has "exclusive power" to select, hire, fire, and supervise inmates; controls schedules, duties and conditions of employment; and determines rates and method of pay. He seeks declaratory, injunctive, and monetary relief including back pay with interest.

DISCUSSION

Since plaintiff's complaint was filed pro se, it has been held "to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, a pro se complaint, like any other, must present a claim upon which relief can be granted by the court. Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). For purposes of this 1915A screening, the court has accepted as true allegations of fact set forth in plaintiff's complaint.

STATE DEFENDANTS

Upon initial examination of the complaint, the court found it subject to dismissal. Defendants EDCF and the KDOC are clearly subject to being dismissed for the reason that neither the KDOC nor the prison facility is a "person" subject to suit under Section 1983. See Will v. Mich. Dep't of State Police,

491 U.S. 58, 66, 71 (1989)(neither state nor state agency is a "person" which can be sued under Section 1983); Davis v. Bruce, 215 F.R.D. 612, 618 (D. Kan. 2003), *aff'd in relevant part*, 129 Fed.Appx. 406, 408 (10th Cir. 2005). Plaintiff argues in his Response that "the KDOC are persons under § 1983 for prospective and injunctive relief, for violations of federally protected rights of liberty interest in moneys they unlawfully withheld by fraud." This assertion is legally incorrect. A state or state agency is not a "person" that Congress made amenable to suit in § 1983. Will, 491 U.S. at 64. Ex parte Young, 209 U.S. 123 (1908), cited by plaintiff, has no application in suits against the States and their agencies, which are barred, absent consent, regardless of the relief sought. Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 145 (1993); Cory v. White, 457 U.S. 85, 90-91 (1982). Consequently, the court dismisses plaintiff's claims against defendants EDCF and KDOC.

INDIVIDUAL DEFENDANTS

Plaintiff has sued the named, individual defendants in their official and individual capacities. The Eleventh Amendment immunizes state officials from suit for money damages in their official capacities, because such suits are, in essence, suits against the state. Hafer v. Melo, 502 U.S. 21,

30-31 (1991); Hunt v. Bennett, 17 F.3d 1263, 1267 (10th Cir.), cert. denied, 513 U.S. 832 (1994). Accordingly, the court dismisses plaintiff's money damages claims against the individual state-employed defendants to the extent they are sued in their official capacities. The Eleventh Amendment does not prevent suits against individual defendants in their official capacity for injunctive or declaratory relief, or against state officials in their individual capacities, or against private entities. See Will, 491 U.S. at 71, FN10.

FLSA CLAIM

The claims raised in the complaint are also subject to being dismissed as against all defendants in either capacity for failure to state a claim. Plaintiff was previously advised that his claims are substantially similar to those determined in this district in Moore v. McKee, 2003 WL 22466160 (D. Kan., Sept. 5, 2003, unpublished)(copy attached to show cause order). The plaintiff in Moore, a state prisoner, brought suit against two officers of Aramark, "the corporation which provides food services at the prison," alleging they violated the FLSA, "breached a contract, and violated his constitutional rights by failing to pay him minimum wage for his services." On defendants' motion to dismiss, the district court accepted plaintiff's allegations that Aramark had contracted with KDOC to

pay no less than minimum wage but to pay such wages to KDOC and not the individual inmates, and that plaintiff was being paid less than minimum wage. The court granted defendants' motion, holding that "plaintiff cannot maintain such a claim because inmates are not 'employees' under the FLSA." Id. at *2, *citing* see Franks v. Okla. State Indust., 7 F.3d 971, 972-73 (10th Cir. 1994); *and* Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991)(inmate not employee under Title VII or ADEA because his relationship with Bureau of Prisons arises out of status as inmate, not an employee). Plaintiff was granted time to show cause why this action should not be dismissed for the reasons stated in Moore and this court's show cause order. He has filed Plaintiff's Response to Show Cause (Doc. 8). Having considered all the materials filed, the court finds as follows.

Plaintiff's claim that he is entitled to relief under the Fair Labor Standards Act is legally frivolous. The FLSA provides that "[e]very employer shall pay to each of his employees . . . not less than" minimum wage. See 29 U.S.C. § 206(a)(1). The Act defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). The term "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency." Id., § 203(d). The term "employ" means "to suffer or permit to work." Id., § 203(g). Over time

Congress has exempted specified classes of workers from FLSA's coverage and broadened coverage of others. Prisoner laborers have never been on the exempted or covered lists.

Plaintiff argues he is an employee as defined in the FLSA, and reasons that prisoners are not among the workers expressly exempted by the statute. The plain language of the statute is too general to be helpful in this case. Neither Congress nor the United States Supreme Court has declared whether prisoner workers are covered by FLSA. Most federal district and appellate courts deciding similar cases have held the FLSA does not apply to prisoner laborers. See Franks, 7 F.3d at 973; Miller v. Dukakis, 961 F.2d 7, 8 (1st Cir.), cert denied, 506 U.S. 1024 (1992)(courts have uniformly denied FLSA and state minimum wage law coverage to convicts who work for the prisons in which they are inmates); Danneskjold v. Hausrath, 82 F.3d 37, 39 (2nd Cir. 1996)(FLSA does not apply to prison inmates whose labor provides services to the prison, whether the work is voluntary or not, whether it is performed inside or outside the prison, and whether or not a private contractor is involved); Tourscher v. McCullough, 184 F.3d 236, 243 (3rd Cir. 1999)(prisoners who perform intra prison work are not entitled to minimum wages under the FLSA); Harker v. State Use Indus., 990 F.2d 131 (4th Cir.), cert. denied, 510 U.S. 886 (1993)(FLSA does not apply to prison inmates performing work at prison

workshop within the penal facility as part of rehabilitative program); Reimonenq v.Foti, 72 F.3d 472, 475 (5th Cir. 1996)(inmate who participates in work-release program has no claim against government under FLSA simply because he is permitted to work for private employer); Sims v. Parke Davis & Co., 453 F.2d 1259 (6th Cir.), cert. denied, 405 U.S. 978 (1971)(inmates working at private drug clinic inside prison not covered by FLSA); Vanskike v. Peters, 974 F.2d 806, 807-08 (7th Cir. 1992), *and cases cited therein,* cert. denied, 507 U.S. 928 (1993); McMaster v. Minn., 30 F.3d 976, 980 (8th Cir. 1994); Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320 (9th Cir. 1991)(inmates not entitled to minimum wage for labor performed for treatment center located in prison pursuant to contract between center and State DOC); Villarreal v. Woodham, 113 F.3d 202, 207 (11th Cir. 1997)(pretrial detainee performing labor for benefit of the correctional facility and inmates not entitled to minimum wage protection of FLSA); Henthorn v. Department of Navy, 29 F.3d 682, 688 (D.C. Cir. 1994)(allegations that prisoner was assigned to work at a Naval Air Station and that BOP set his rate of pay and actually paid him fail to state claim under FLSA). Cases holding that prisoner laborers were not "employees" under FLSA have generally involved inmates working within the prison for prison authorities or for private employers. See e.g., Franks, 7 F.3d at 973 (FLSA does not apply

to prisoners working inside prison); Vanskike, 974 F.2d at 808 (prisoner assigned to "forced labor" within prison is not "employee" under FLSA). Most courts opined in dicta that prisoners are not categorically always barred from being "employees" covered by FLSA.

The rare cases where courts found the FLSA covered inmate labor involved prisoners working outside the prison directly for private employers. See Watson v. Graves, 909 F.2d 1549, 1553-54 (5th Cir. 1990)(prisoners required to work for private construction company outside the prison to provide jailer's relative with commercial advantage were "employees" of company governed by FLSA); Carter v. Dutchess Community College, 735 F.2d 8, 13-14 (2d Cir. 1984)(prisoner working as a teaching assistant at community college which paid him wages directly could be FLSA "employee"). Plaintiff cites these two cases as authority for his claims. However, their facts are distinguishable from plaintiff's case[2] in that he is not working outside the prison, or directly employed by a private enterprise. Moreover, the rationales in these two cases are not as persuasive and have been called into question by later

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[2] Plaintiff's exhibit of the Warden's response to his administrative grievance at EDCF provides in relevant part:

> Employment in food service as a job assignment in this correctional facility does not constitute private prison based employment. . . .
>
> As a food service worker you were given a work assignment. That work assignment and compensation are governed by IMPP 10-109 (Inmate Work Assignments).

opinions in the Second, Fifth and other Circuits.

The reasoning in cases finding prisoner laborers not covered by FLSA is much more persuasive. First, the Thirteenth Amendment excludes convicted criminals from its prohibition of involuntary servitude, so prisoners may be required to work without any compensation. Vanskike, 974 F.2d at 809. Since there is no federal constitutional right to compensation for prisoner labor; pay is "by the grace of the state." Id. Second, the relationship between the KDOC and "a prisoner is far different from a traditional employer-employee relationship." Id. It is clear from Kansas law that the KDOC retains ultimate control over its prisoners in work release programs. The KDOC's "control" over plaintiff is far greater than an employer's and "does not stem from any remunerative relationship or bargained-for exchange of labor for consideration, but from incarceration itself." Id. at 809-10 (When prisoners "are assigned work within the prison for purposes of training and rehabilitation, they have not contracted with the government to become its employees."). In short, plaintiff is not in a true economic employer-employee relationship with Aramark or the KDOC, so the FLSA does not cover him. Id. at 812.

Plaintiff contends the four factors of the economic reality test must be applied to determine his claims, and cites Watson and Carter. Under the Ninth Circuit test, a court

inquired: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." Bonette v. California Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983)(no longer good law). However, even those courts applying the economic reality test have generally held prisoners are not "employees" entitled to minimum wage under the FLSA. See e.g., Hale v. Arizona, 993 F.2d 1387 (9th Cir.) (en banc), cert. denied, 510 U.S. 946 (1993); Vanskike, 974 F.2d at 806; Miller, 961 F.2d at 7. More significantly, this district and the Tenth Circuit Court of Appeals have held that the Bonnette economic test does not apply to prisoners. Franks, 7 F.3d at 973; see Rhodes v. Schaefer, 2002 WL 826471 (D. Kan. March 20, 2002, unpublished)(copy attached). As the Seventh and Ninth Circuits reasoned, the traditional factors of the "economic reality" test "fail to capture the true nature of [most prison employment] relationship[s], for essentially they presuppose a free labor situation." Vanskike, 974 F.2d at 809; see Hale, 993 F.3d at 1394 (quoting Vanskike). The Seventh Circuit explained:

> Prisoners are essentially taken out of the national economy upon incarceration. When they are assigned work within the prison for purposes of training and rehabilitation, they have not contracted with the government to become its employees. . . .

Vanskike, 974 F.2d at 810. The Ninth Circuit further explained in Hale:

> [t]he case of inmate labor is different from [the] type of situation where labor is exchanged for wages in a free market. Convicted criminals do not have the right freely to sell their labor and are not protected by the Thirteenth Amendment against involuntary servitude.

Hale, 993 F.2d at 1394; Vanskike, 974 F.2d at 809 (Thirteenth Amendment's specific exclusion of prisoner labor supports idea that a prisoner performing required work for the prison is actually engaged in involuntary servitude, not employment).

This court agrees with the majority of courts that the "policies underlying the FLSA . . . have limited application in the separate world of prison." Vanskike, 974 F.2d at 810. Requiring the payment of minimum wage for a prisoner's work in prison would not further the fundamental goal of the FLSA to ensure workers' welfare and standard of living since a prison inmate's basic needs are met irrespective of inability to pay. The second purpose of the Act - to prevent unfair competition - is protected by other statutes, regulations and contract provisions. For example, with respect to prison-made goods, the Ashurst-Sumners Act, 18 U.S.C. §§ 1761-62, penalizes their transportation in commerce. However, governments are rationally permitted to use the fruits of prisoner labor. Plaintiff does not make goods distributed outside the prison, but is assigned to work in food service at the prison. Plaintiff is not subject

to FLSA simply because non-inmates could be hired to do his job.

DUE PROCESS RIGHT CREATED BY STATE LAW

Plaintiff also claims Kansas law and regulations have created a liberty interest in minimum wages protected by Due Process. In particular, he cites K.A.R. 44-7-108. This administrative regulation provides in pertinent part:

> . . . inmates having minimum or medium security classification may work at paid employment for a private industry or other business approved by the Secretary. The program shall be referred to as nonprison employment. The program shall be distinct from any program of employment of inmates by private business which is leasing space on the premises of the correctional facility. No inmate shall be engaged in the nonprison employment program unless minimum wage is paid. Minimum wage shall be state minimum wage unless federal contracts are involved. . . .

Id. The court is presented with no facts indicating this regulation applies to plaintiff's work for Aramark. Plaintiff's own allegations indicate Aramark is managing food service operations within the prison. There are no facts alleged suggesting it is the "Private non-prison employment" expressly covered[3] by this regulation. Instead, if it is private industry employment it is prison based, which is explicitly excluded from

[3] Even if this regulation were held to cover plaintiff's work with Aramark, it requires payment of minimum wage but not directly to the inmate. By plaintiff's own allegations, Aramark is apparently paying minimum wage to KDOC/EDCF.

this regulation's coverage. The court concludes no liberty interest is created by this regulation.

Plaintiff complains in his Response that defendants are not complying with K.A.R. 44-7-108, which he alleges requires that Aramark be treated as an independent contractor and not as an agent or employee of the State of Kansas. This court finds no such requirement in the cited regulation. Nor does plaintiff allege any facts indicating Aramark is being treated other than in accordance with the policy statements, regulations and state statutes governing prison based employment and/or work release programs. In any event, a violation of a state regulation is not grounds for a civil rights complaint.

Plaintiff alleges Aramark has paid the minimum wage, but officials at EDCF and KDOC have withheld most of that money. He claims KDOC and its agents and employees are "required by law" to deposit all the moneys earned at the prevailing local minimum wage in the inmate trust accounts. However, he does not allege facts indicating that his work for Aramark is direct, independent employment or specify language in any law which so requires.

Plaintiff suggests that provisions of IMPP 10-109 and IMPP 10-128 support his claims, but does not explain how. He does not cite any particular provision in IMPP 10-109. This policy statement governs "work assignments" at the prison and

provides that inmates "shall be assigned to jobs in the facilities." It states work assignments are designed to occupy inmates' time in a productive manner and to provide opportunities to develop vocational skills and work habits. Performance is evaluated and considered an indicator of progress on the inmate's program plan. "Facility support" is defined as "assignments in which inmates are engaged in operational support activities, e.g., food service . . . ." The warden is to ensure the development of a "facility work plan." The plan is to provide for an adequate number of positions to meet the workload needs of the facility's operational activities, private employment ventures, and community work projects. "Work assignment" is defined as the "job or program activity assigned to an inmate by the unit team as necessary to meet the needs of the facility work plan or to satisfy the elements of the Inmate Program Agreement." Under this policy statement, the warden "shall promulgate a general order specifying procedures for assignment of inmates to work/program activities." The "unit team shall be responsible for all work assignments." Any inmate may be moved from one job classification to another "based upon the unit team's recommendation and judgment of the inmate's performance," following consultation with the supervisor. "Removal of an inmate from a work assignment shall be the responsibility of the unit team." The "responsibility for all

work assignments and jobs/activities assigned to all inmates shall rest with each inmate's unit team." The unit team is to attempt to match the abilities of the inmate to the required tasks of a work assignment.

Inmates "shall be compensated for participation in work assignments." Each work assignment is classified by skill level, and inmates receive "incentive pay" for days worked on assignments commensurate with their level. Pay rates vary from $.45 to $1.05 daily. Kansas Correctional Industries (KCI) pay rates are set at $.25 to $.60 per hour. Inmates "working directly for a private industry . . . shall be paid" minimum wage or the local prevailing wage.

IMPP 10-109 supports the warden's response that plaintiff's labor for Aramark is a "work assignment," rather than plaintiff's claims that he is an "employee" under the FLSA. It also indicates the Unit Team has considerable control over work assignments and provides incentive pay and KCI pay rates for inmates that are far less than federal minimum wage.

Plaintiff claims IMPP 10-128 "contradicts" the warden's response to his administrative grievance. IMPP 10-128, pertinently provides that KDOC:

> supports and encourages the utilization of private industry to supplement traditional inmate work opportunities," and that private industry work programs may be established to provide inmate employment opportunities to learn job skills and develop good work habits and

> attitudes that inmates can apply to jobs after they are released.

It further provides:

> whether operating in a community setting or on the grounds of a correctional facility, private industry employment programs shall be considered work release in accordance with K.A.R. 44-8-115 or 44-8-116[4].

"Private Industry Employment Program" is defined as "the term used to refer generally and collectively to private prison based and private non-prison based employment programs." "Private Prison Based Employment" is defined as "Inmate employment for a private industry, which operates on the grounds of a correctional facility pursuant to K.A.R. 44-8-116." IMPP 10-128 also provides that procedures for implementing private industry employment programs include "agreements between private companies and the Department of Corrections for the employment of inmates." It states the "agreement shall provide that the Balance of State Average Lowest Tenth Percentile Wage as reported by the Kansas Department of Human Resources for similar types of work shall be the minimum amount paid to private industry inmate employees . . . ." The agreement also allows "for wages paid by the private industry to be placed into the trust account of the inmate employee." A formal agreement

[4] K.A.R. 44-8-116 provides that private prison based employment is work release: "Private enterprises which operate on the grounds of a correctional institution and employ inmates shall be work release programs."

between the private industry and the KDOC is required for operation of a private prison-based employment program. Included in negotiations on the agreement are the private company, the warden of the host facility, and the Deputy Director of KCI. Subsection IV(A) provides, "Participation of inmates in private industry employment programs shall be pursuant to K.A.R. 44-8-114[5] through K.A.R. 44-8-116 and procedures established by IMPP 15-101." Thus, this policy statement defines employment with a private industry as a work release program. It does not create any right for plaintiff to receive minimum wage, even if paid to KDOC by the private entity. It does not contradict the warden's statement that plaintiff's job is a "work assignment" rather than private employment.

In his Response, plaintiff also cites K.S.A. 44-1001, the Kansas Act Against Discrimination. This statute provides no authority for the relief plaintiff seeks. Furthermore, plaintiff does not show he has exhausted administrative remedies as required under the Act. See Rhodes, at *5.

Instead of supporting plaintiff's claims, Kansas law casts considerable doubt on his claims as to the nature of his work for Aramark and that he is legally entitled to wages, which

[5] K.A.R. 44-8-110 through -114 were revoked on March 22, 2002. K.A.R. 44-8-115 deals with non prison based employment only.

are being taken without due process. See Ellibee v. Simmons, 2005 WL 1863244 (D.Kan. Aug. 4, 2005, unpublished) *and cases cited therein* (copy attached). K.A.R. 44-8-101 defines "employer" as "those persons, businesses, private interests, or corporations acting as agents of the secretary of corrections by providing paid employment to work release participants." "Staff" includes those persons employed by an agent having a contract with the secretary of corrections, who are authorized to directly supervise and exercise legal authority over work release participants." K.A.R. 44-8-102 provides that in the work release program, a per diem rate established by the secretary of corrections for each day in the program shall be charged to the participants for food and lodging, and this money shall be returned to the funding source for participants of state operated facilities or paid to the correctional facilities in which the participant is housed. K.A.R. 44-8-104 provides that a written work release agreement shall be executed between the SOC and the participant, which provides for the disbursement of the participant's earnings. "A written agreement shall" also "be executed between the secretary of corrections and the employer" which will provide: information to the employer about the work release program and regulations, the rate of compensation and pay period interval, and the participant's regular work schedule. The "work release plan agreements shall

be maintained as permanent records in the department of corrections' official file on the participant." K.S.A. 75-5210(h) provides any inmate participating in work release programs continues to be in the legal custody of the SOC, and "any employer" of that person "shall be considered the representative or agent for the secretary."

IMPP 15-101 provides the "selection criteria and placement procedures for the KDOC's work release programs, and states that private prison based/non-prison based employment shall be based upon the inmate's need for such a program and security considerations. Participation in work release "shall be voluntary." Participants may apply to the unit team and are recommended for participation. If an inmate is determined to be eligible for work release placement, the unit team forwards a form to the facility's "Program Management Committee" for approval or disapproval, which must then be signed by the warden and forwarded for consideration to the "Deputy Secretary of Facility Management." Participants must be informed of and agree to abide by all policies and procedures applicable to program participation. "Private enterprises which operate on the grounds of a correctional institution and employ inmates shall be work release programs." The Warden "shall maintain" in the inmate's file a permanent record of disbursement of the inmate's earnings, rate of compensation, and pay period

interval. The Warden may terminate or suspend an inmate's participation in the work release program for reasons including lack of interest or motivation, inability to adjust or perform as required, conflict with co-workers or employer, inability to conform to the program structure, activities discrediting the work release program, and at the inmate's request. "Work release program staff" are to document termination, through a review of the inmate's performance. IMPP 15-101(VIII)(C) provides "A per diem rate of 25% shall be charged to the inmate for food and lodging" and "shall be paid to Kansas Correctional Industries (KCI)."

K.S.A. 75-5275(a) authorizes the secretary to purchase materials and employ supervisory personnel necessary to establish and maintain for the state at each correctional institution, industries for the utilization of services of inmates in providing products or services as may be needed for the operation, maintenance or use of any government agency or organization. K.S.A. 75-5288(b) provides, "Subject to approval by the secretary of corrections, any corporation . . . under this section may employ selected inmates of the correctional institution upon whose grounds it operates." K.S.A. 75-5268 provides for the disposition of compensation paid to inmates in the work release and job training programs. It specifies that "any inmate who is allowed to participate in such paid

employment . . . shall pay over to the secretary . . . all monies received, except that pursuant to rules and regulations adopted by the secretary . . . the inmate shall retain a stipulated reasonable amount of the money as the secretary . . . deems necessary for expenses connected with the employment . . . ." The balance of the moneys paid to the secretary "shall be disbursed" for specified purposes including the inmate's food and lodging, support of dependents receiving public assistance, care of immediate family if reduced to judgment, costs assessed to inmate by clerk of court, orders of restitution, savings for disbursement to inmate upon release, and payment of "inmate's other obligations acknowledged by him in writing." The "balance, if any, shall be credited to the inmate's account." K.S.A. 75-5211(b) provides the SOC shall prescribe procedures for withdrawing amounts from the compensation paid to inmates from all sources for moneys of work release participants. K.S.A. 75-5275 also provides: "If an inmate receives at least federal minimum wage pursuant to a contract authorized by this subsection, the provisions of K.S.A. 75-5211 and 75-5268 . . . for withdrawing amounts from the compensation paid to inmates shall apply." It is evident that none of the relevant state laws creates a right for plaintiff to receive minimum wage for a prison work assignment.

While it is not clear from plaintiff's complaint or

Response precisely what type of work release program his food service duties fall into, it is apparent no contract was negotiated or entered into directly between him and Aramark, and he is not engaged in non-prison based employment. None of the regulations cited herein governing work release program assignments within KDOC prisons provides that the participating inmate is entitled to receive federal or state minimum wage for his labor in such programs. Instead, either significant deductions are made from wages for various, specified purposes such as for food and board; or inmate incentive pay is limited to much less than minimum wage. The court concludes that neither the regulations cited by plaintiff nor any other regulations or statutes reviewed by this court governing prison based work release programs create a liberty interest in plaintiff to federal or state minimum wage. Plaintiff's claim that such a liberty interest has been created by state law is frivolous.

FRIVOLOUS UNDER MOORE & FRANKS

Plaintiff has not alleged facts in response to the show cause order, which convince this court that his case is distinguishable from Moore. He argues his case should be distinguished from Moore because the plaintiff in that case sued officers of Aramark and not the corporation. However, officers

of the corporation are its agents and they were sued in their official capacity in Moore. Plaintiff mentions the holding in Moore that "absent privity of contract, plaintiff could not maintain a breach of contract claim." The lack of a breach of contract claim was not the sole basis for the Moore decision. The court also expressly held that neither the FLSA nor the United States Constitution conferred any rights for prisoners to receive certain wages. Moore, 2003 WL at *2. Plaintiff's case is not distinguishable from Moore simply because he appended the phrase "injunctive relief" to his money damages claim. Plaintiff also argues his case is distinguishable from Moore and Franks because the plaintiffs did not cite K.A.R. 44-7-108 and K.S.A. 44-1001 as authority. As noted herein, these two citations do not support plaintiff's claims for relief.

The Tenth Circuit Court of Appeals in Franks considered a complaint by state prisoners seeking declaratory, injunctive and monetary relief based on the failure of the Oklahoma State Industries, a division of the Oklahoma Department of Corrections, to pay minimum wage pursuant to the FLSA. The Tenth Circuit found the complaint failed to state a claim upon which relief could be granted. They reasoned that the inmate was not an "employee" within FLSA because his relationship with the defendants arose out of his status as an inmate, not an employee. Since Franks, the Tenth Circuit has dismissed other

claims similar to plaintiff's as frivolous. They cited Franks in dismissing an inmate's claim that he was denied minimum wage for working for a private entity on prison grounds, finding the FLSA "does not normally apply to prisoners." Phillip v. Mondragon, 42 F.3d 1406 (10th Cir. 1994, Table)(copy attached). They found another prisoner's claims, that he was not paid minimum wage for work performed in prison and was subjected to involuntary servitude, were frivolous and failed to state a claim. Berry v. Oklahoma, 64 Fed.Appx. 120, 2003 WL 1827802 (10th Cir. 2003, unpublished)(copy attached).

Plaintiff argues that neither Moore nor Franks dealt with an actual private industry. He alleges Aramark is a private industry and not a part of Kansas Correctional Industries, which is not a private industry. Plaintiff makes only conclusory statements regarding Aramark, its internal operations, and its alleged "exclusive power" over inmate workers. He presents no facts and recites no contract provisions or regulations to support these self-serving allegations. This court need not accept plaintiff's legal conclusions cast in the form of factual allegations, nor his inferences if they are unsupported by the facts set out in the complaint. However, even if plaintiff's unsupported factual allegations are accepted as true, whether his prison based work is for a private industry or not is legally insignificant. Contrary to plaintiff's conclusory

statements, statutes and regulations governing work release programs indicate the SOC, the unit team, and the program facilitators retain ultimate control of the inmates even when they are involved in private industry work programs.

EQUAL PROTECTION CLAIM

Plaintiff claims that singling out inmates to deny minimum wage violates equal protection. Plaintiff presents no legal basis for holding the class of all prison inmates is a protected class, and case law is to the contrary. Furthermore, he alleges no facts whatsoever to support a claim that he has been deprived of equal protection. Hall, 935 F.2d at 1110 (conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based).

OTHER CLAIMS

Plaintiff's allegations that one who complains about the failure to pay minimum wage will be retaliated against and fired, as well as that he will be punished with disciplinary action if he refuses to work for less than minimum wage are speculative and not supported by any facts. These claims asserted as First Amendment violations and plaintiff's assertion of a Fourth Amendment violation are completely conclusory and do not state a claim. Plaintiff's claim that the prison accountant

breached the contract between the KDOC/EDCF and Aramark is not supported by facts, and there is no legal authority for him to pursue a breach of contract claim on a contract to which he is neither a party nor a beneficiary.

For all the foregoing reasons, the court finds this complaint should be dismissed for failure to state a claim.

IT IS THEREFORE BY THE COURT ORDERED that is action is dismissed and all relief denied.

IT IS SO ORDERED.

Dated this 28th day of December, 2005, at Topeka, Kansas.

s/Sam A. Crow
U. S. Senior District Judge

Briefs and Other Related Documents
Only the Westlaw citation is currently available.
United States District Court,D. Kansas.
Nathaniel W. ELLIBEE, Plaintiff,
v.
Charles E. SIMMONS, Defendant.
No. 03-3194-JWL.

Aug. 4, 2005.

Nathaniel W. Ellibee, El Dorado, KS, pro se.
Brian D. Sheern, Kansas Attorney General, Topeka, KS, for Defendant.

MEMORANDUM & ORDER

LUNGSTRUM, J.
***1** Plaintiff, a prisoner in the custody of the State of Kansas, has filed this lawsuit against defendant, the former Secretary of Corrections for the Kansas Department of Corrections, [FN1] alleging that the deduction of 5 percent of plaintiff's wages earned from his private prison employment for crime victim compensation violates plaintiff's constitutional rights. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983. This matter is presently before the court on the parties' cross-motions for summary judgment. [FN2] As explained in more detail below, plaintiff's motion is denied, defendant's motion is granted and plaintiff's complaint is dismissed in its entirety.

FN1. Plaintiff has sued Mr. Simmons in both his official and individual capacities. Plaintiff's claims for monetary damages and a declaratory judgment against defendant in his official capacity are barred by the Eleventh Amendment. *See Meiners v. University of Kansas,* 359 F.3d 1222, 1232 (10th Cir.2004); *White v. State of Colorado,* 82 F.3d 364, 366 (10th Cir.1996). His claims for injunctive relief against defendant in his official capacity, however, are not barred by the Eleventh Amendment. *Meiners,* 359 F.3d at 1232.

FN2. Two additional motions are also pending before the court-plaintiff's motion to toll the time period for plaintiff to file a response to defendant's motion for summary judgment and plaintiff's motion for oral argument on the motions for summary judgment. Plaintiff's motion to toll the time period for him to respond to defendant's motion for summary judgment is moot. In his motion, plaintiff requested that he not be required to file a response to defendant's motion until the magistrate judge ruled on his pending motion to compel discovery. At the time he filed his motion, however, Judge O'Hara had already issued an order denying the motion to compel. In any event, it appears that plaintiff waited to file his response until he received the order and, thus, the motion is moot. Plaintiff's motion for oral argument on the motions for summary judgment is denied as the court believes argument is unnecessary given the parties' detailed and intelligible briefing on all issues. *See* D. Kan. Rule 7.2 (requests for oral argument are granted only at the court's discretion).

Facts

The facts relevant to plaintiff's claims are uncontroverted. Kansas law requires that "any inmate employed in a private industry program ... shall ... have deduction [sic] of 5% of monthly gross wages paid to the crime victim compensation fund or a local property crime fund for the purpose of victim compensation." *See* K.S.A. § 75-5211(b). To implement this deduction and other deductions required by statute, the Secretary of the Kansas Department of Corrections adopted Internal

Management Policy and Procedure (IMPP) 04-109. In relevant part, IMPP 04-109 states that "a minimum five (5) percent of the gross wages earned by inmates employed in private non-prison based or prison based work release programs shall be paid to the Crime Victims Compensation Board for the purposes of victim compensation."

Plaintiff is employed by a private prison-based employer at the facility in which he is incarcerated. From August 1996 through May 2001, the KDOC deducted $3223.09 from plaintiff's inmate trust fund account for crime victim compensation. In his complaint, plaintiff asserts that this deduction constitutes an unlawful government taking in violation of the Fifth Amendment and cruel and unusual punishment in violation of the Eighth Amendment. He further asserts that IMPP 04-109 violates the reexamination clause of the Seventh Amendment and violates the due process and equal protection clauses of the Fourteenth Amendment. [FN3]

FN3. In his motion for summary judgment, plaintiff asserts for the first time that the deduction also constitutes an unreasonable seizure in violation of the Fourth Amendment. The court construes these allegations as a request to amend the complaint, *see Martinez v. Potter*, 347 F.3d 1208, 1211 (10th Cir.2003) (inclusion of new allegations in a response to a motion for summary judgment should be considered a request to amend the complaint pursuant to Federal Rule of Civil Procedure 15), and denies the request. Significantly, plaintiff moved to amend his complaint to add a Fourth Amendment claim when discovery was still ongoing and within the time period set forth in the scheduling order. Defendant did not oppose the motion and, on March 22, 2005, Judge O'Hara granted plaintiff's motion and directed plaintiff to file his amended complaint within 11 days of the date of his order. Despite having the opportunity to do so, plaintiff never filed an amended complaint. *See id.* at 1212 ("If an amendment is permitted, we think the federal rules contemplate a formal amended complaint."). To permit an amendment at this time would be unduly prejudicial to defendant as discovery has been closed for more than two months. *See id.* (district court did not abuse discretion in refusing to permit plaintiff to amend complaint at summary judgment stage where discovery had closed).

Protected Property Interest

To state claims under the Fifth Amendment and under the due process clause of the Fourteenth Amendment, plaintiff must first establish that he possesses a constitutionally protected property interest. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-01, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) (Fifth Amendment takings clause); *Boutwell v. Keating*, 399 F.3d 1203, 1211 (10th Cir.2005) (due process claim) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). Property interests are not created by the Constitution, but rather by independent sources such as state law. *Brown v. New Mexico State Personnel Office*, 399 F.3d 1248, 1254 (10th Cir.2005) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (to have a protected interest, there must be a legitimate claim of entitlement grounded in state law).

***2** Plaintiff does not have a protected interest in the full amount of his wages. Kansas state law permits the Department of Corrections to promulgate rules and regulations providing for various deductions and specifically requires a 5 percent deduction for victim compensation from the wages of those inmates, like plaintiff, who are employed in a private industry program. *See* K.S.A. § 75-5211(b). Nothing in the statutory scheme provides an entitlement to the full amount of wages earned. As the Kansas Court of Appeals has explained,

It is well established that a state may legitimately restrict an inmate's privilege to earn a wage while incarcerated. The benefits of employment during

incarceration are granted by the state as a privilege and not as a right.... [W]hatever right Appellants have to compensation is solely by the grace of the state and governed by rules and regulations promulgated by legislative direction.

Ellibee v. Simmons, 32 Kan.App.2d 519, 522, 85 P.3d 216 (2004) (quoting *Cumbey v. State*, 699 P.2d 1094, 1097-98 (Okla.1985) (viewing inmates' trust accounts as "conditional credits of potentially accessible funds, rather than vested property interests")). Neither do prison policies or regulations provide plaintiff a constitutionally protected property interest in the full amount of his wages. In fact, IMPP 04-109 expressly states that " all monies received by inmates" from employment " shall be secured and disbursed in a manner and in the amount required by State statute and administrative regulations." To the extent plaintiff has a protected interest in his wages, that interest would extend only to those wages remaining in his account after all mandated deductions are made. *See* IMPP 04-109 § V.B.11 ("Any monies [received from employment] remaining may be expended by the inmate at their discretion, subject to the approval for withdrawal by the warden or designee."); *Gillihan v. Shillinger*, 872 F.2d 935, 939 (10th Cir.1989) (Wyoming statutory scheme created legitimate expectation that money remaining in inmate trust account after deductions, including deductions for victims compensation, would be returned to the inmate at the end of his incarceration).

Accordingly, because neither Kansas law nor any other "independent source" provide plaintiff a constitutionally protected property interest in the full amount of his wages, his claims under the Fifth Amendment and the due process clause of the Fourteenth Amendment must fail. *See Ziegler v. Whitney*, 2004 WL 2326382, at *2 (10th Cir. Oct.15, 2004) (no due process claim based on the payment of less than the prevailing wage for work performed as an inmate; inmates do not have a protected property interest in the wages earned from employment); *McIntyre v. Bayer*, 2003 WL 21949154, at *1 (9th Cir. Aug.13, 2003) (no due process claim based on deductions from inmate's trust account for victim compensation; inmate had no right to a prison job, no right to earn wages from such a job and, thus, no protected interest in the wages from that job); *Washlefske v. Winston*, 234 F.3d 179, 186 (4th Cir.2000) (no takings claim under Fifth Amendment where prison expended interest earned on inmate's trust account for the general benefit of all inmates; no protected property interest where state statutory scheme gave inmate only limited rights to funds in his account); *Christiansen v. Clarke*, 147 F.3d 655, 657 (8th Cir.1998) (no due process claim where prison deducted amounts from wages for room and board expenses; no protected property interest in full amount of his salary where statutory scheme authorized the deduction); *Petrick v. Fields*, 1996 WL 699706, at *1-2 (10th Cir. Dec.6, 1996) (no due process claim based on interest earned on funds in inmate trust account; no constitutionally protected property interest existed); *Brady v. Tansy*, 1993 WL 525680, at *(10th Cir. Dec.21, 1993) (inmate had no protected interest in full amount of wages where state statutory scheme permitted the deductions at issue).

Equal Protection

***3** According to plaintiff, defendant's IMPP 04-109 violates the Equal Protection clause of the Fourteenth Amendment because that portion of the policy requiring payment of 5 percent of an inmate's gross wages for victim compensation applies only to those inmates employed in private non-prison based work release programs and prison-based work release programs. In contrast, those employees employed in traditional work release programs are only required to pay 5 percent of their gross wages for victim compensation pursuant to an order of restitution. Plaintiff also highlights that only minimum security inmates are eligible for traditional work release programs and, as a maximum security inmate serving a life sentence, plaintiff will never be eligible for the traditional work release program.

To state an equal protection claim, plaintiff must allege that the government treated him differently than others who were similarly situated. *See Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432,

105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Plaintiff has failed to identify any similarly situated inmates who were given preferential treatment under the policy. In fact, plaintiff concedes that the policy applies with the same force to those inmates who are similarly situated to plaintiff-inmates who are employed in private non-prison based work release programs or prison-based work release programs. Summary judgment in favor of defendant is appropriate on this claim. *See Sanders v. Saffle*, 2000 WL 293826, at *2 (10th Cir. Mar.21, 2000) (in order to show equal protection violation based on policy that differentiated among inmates based in part on security classification, inmate had to show that other inmates in his security classification were treated differently). FN4

FN4. According to plaintiff, he attempted to secure from defendant documentation concerning defendant's rationale for the " disparity of treatment" between those inmates employed in traditional work release programs and inmates employed in other programs. Plaintiff asserts that defendant advised him that all documents concerning the drafting of IMPP 04-109 had been destroyed. Regardless of whether the documents were destroyed, the evidence that plaintiff seeks would not save his equal protection claim for the reasons explained in the text.

Seventh Amendment

Plaintiff next asserts that defendant violated the reexamination clause of the Seventh Amendment by essentially "resentencing" him to restitution in the amount of $3223.09 when the sentencing court imposed a sentence that did not include an order of restitution. The Seventh Amendment provides that " no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. Amend. VII. The Seventh Amendment protects a party's right to a jury trial by ensuring that factual determinations made by a jury are not thereafter set aside by the court, except as permitted under the common law. *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1442-43 (10th Cir.1988). On its face, then, the reexamination clause is inapplicable to this case and plaintiff's claim under the Seventh Amendment is frivolous. Simply put, plaintiff points to no "fact tried by a jury" that was thereafter reexamined by any court. Summary judgment in favor of defendant is appropriate on this claim.

Eighth Amendment

Finally, plaintiff asserts that defendant subjected him to cruel and unusual punishment within the meaning of the Eighth Amendment by deducting from his wages an amount to be paid for victim compensation. According to plaintiff, the deduction is "above and beyond the lawful sentence imposed by the court" and, thus, constitutes a "punative [sic] sanction." Only those deprivations "denying the minimal civilized measure of life's necessities ... are sufficiently grave to form the basis of an Eighth Amendment violation." *Ledbetter v. City of Topeka, Kansas*, 318 F.3d 1183, 1188 (10th Cir.2003). Plaintiff has not asserted that the deduction has deprived him of any necessities. Summary judgment, then, is warranted in favor of defendant on this claim. *See Sellers v. Worholtz*, 2004 WL 119882 (10th Cir. Jan.27, 2004) (withdrawal of funds from prison account to pay various fees did not violate Eighth Amendment rights where prisoner did not show that he was unable to obtain necessities).

*4 IT IS THEREFORE ORDERED BY THE COURT THAT plaintiff's motion for summary judgment (doc. 44) is denied; defendant's motion for summary judgment (doc. 49) is granted; plaintiff's motion to toll the time period for plaintiff to file a response to defendant's motion for summary judgment (doc. 55) is moot; and plaintiff's motion for oral argument on the parties' motions for summary judgment (doc. 59) is denied. Plaintiff's complaint is dismissed in its entirety with prejudice.

IT IS SO ORDERED.

D.Kan.,2005.
Ellibee v. Simmons

Slip Copy, 2005 WL 1863244 (D.Kan.)
(Cite as: Slip Copy)

Slip Copy, 2005 WL 1863244 (D.Kan.)

Briefs and Other Related Documents (Back to top)

- 5:03cv03194 (Docket) (Apr. 24, 2003)

END OF DOCUMENT

Only the Westlaw citation is currently available.
United States District Court,D. Kansas.
Ronald L. RHODES, Plaintiff,
v.
Greg SCHAEFER, et al., Defendants.
Civil Action No. 98-3323-GTV.

March 20, 2002.

MEMORANDUM AND ORDER

G.T. VANBEBBER, Senior District Judge.
*1 This matter comes before the court on a civil action filed pro se by a prisoner in the custody of the Secretary of the Kansas Department of Corrections. Plaintiff commenced this action against three employees of Impact Design, Inc., a private employer operating a business on the grounds of the Lansing Correctional Facility, two employees of the Kansas Department of Corrections, and members of the Kansas Civil Rights Commission.

By an earlier order, the court granted the motion to dismiss filed on behalf of the defendants employed by the Kansas Civil Rights Commission. This matter is presently before the court on the motion to dismiss filed by the employees of the Kansas Department of Corrections (Doc. 50) and on the motion for summary judgment filed by the employees of Impact Design (Doc. 53).

Factual Background

Plaintiff is an inmate incarcerated under a life sentence and housed at the Lansing Correctional Facility, Lansing, Kansas (LCF).

Impact Design, Inc. (Impact) has a contractual relationship with the State of Kansas under which Impact leases building space at LCF to operate its business. The Kansas Department of Corrections provides Impact Design with a labor pool comprised of inmates. Defendant Mike Neve, classification administrator at LCF, is responsible for review and recommendation of inmate participation in programs. In June 1997, defendant Neve issued an interdepartmental memorandum establishing the employment criteria for Impact. (Doc. 30, Ex. A.).

Defendant Colette Winkelbauer, a Unit Team Manager at LCF, conducted a preliminary screening of plaintiff's eligibility under these criteria and determined he was ineligible. By correspondence dated September 15, 1997, plaintiff sought review of this decision. Defendant Winkelbauer reconsidered plaintiff's eligibility and determined there was an error. As a result, she sent plaintiff's application to Impact on September 23, 1997. (*Id.*, Ex. C.) Plaintiff was interviewed by representatives of Impact in or about 1998 but was not accepted for assignment. (*Id.*, Ex. E.)

In June 1998, plaintiff wrote to defendant Winkelbauer advising her that the KHRC had filed a complaint on his behalf alleging racial discrimination. He sought a copy of his earlier correspondence to her. (*Id.*, Ex. F.) After review, the KHRC administratively closed the charge for lack of jurisdiction, and plaintiff did not seek reconsideration or appeal under state law provisions for judicial review of agency action.

Under the agreement between Impact and the Kansas Department of Corrections, the State of Kansas has exclusive authority to decide which inmates may be interviewed by Impact, and all inmates assigned must pass a security clearance. The Department of Corrections provides corrections officers to supervise inmates assigned to Impact. Payment for inmate work is made to the Department of Corrections, which deducts payments for such costs room and board, training, and victim restitution; inmate workers receive a credit of $35.00 for purchases at the prison canteen. The

Department of Corrections may direct the removal of any inmate from assignment to Impact, may halt production at Impact, and issues guidelines for discharge from assignment to Impact. Inmates assigned to Impact are considered wards of the state and are not eligible for unemployment compensation.

***2** Plaintiff brings the present action alleging violations of the Kansas Act Against Discrimination (KAAD) and Title VII (Doc. 1, p. 2 .)

Discussion

Department of Corrections defendants

Defendants Winkelbauer and Neve move for dismissal and allege plaintiff's claim under Title VII should be dismissed because he lacks standing to pursue a charge of discrimination under Title VII. They contend plaintiff's relationship with the Department of Corrections arises from his status as a prisoner.

These defendants also allege plaintiff's claim of conspiracy fails because he has no employment relationship with them and because, even assuming standing under Title VII, he has failed to adequately plead a conspiracy and an actual deprivation of protected rights.

The court may grant a motion to dismiss pursuant to Rule 12(b)(6) where it appears beyond a doubt the plaintiff is unable to prove any set of facts entitling him to relief, *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957), or where an issue of law is dispositive, *Neitzke v. Williams,* 490 U.S. 319, 326 (1989). "All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." *Swanson v. Bixler,* 750 F.2d 810, 813 (10th Cir.1984) (citation omitted). The court views all reasonable inferences in favor of the plaintiff and liberally construes the pleadings. *Id.* (citation omitted). However, the court should not assume the plaintiff "can prove facts that it has not alleged or that the defendants have violated the ... laws in ways that have not been alleged." *Associated General Contractors v. California State Council of Carpenters,* 459 U.S. 519, 526 (1983) (footnote omitted).

The resolution of plaintiff's claims against defendants Neve and Winkelbauer under Title VII turns upon whether there is an employment relationship between these parties.

The most instructive precedent in the Tenth Circuit addressed a Title VII claim by a federal prisoner against prison officials. In *Williams v. Meese,* 926 F.2d 994 (10th Cir.1994), the Tenth Circuit concluded the plaintiff enjoyed no substantive rights under Title VII because the relationship between him and the defendant correctional officers arose from plaintiff's status as an inmate, rather than as an employee. The court explained its reasoning as follows:

We conclude that plaintiff is not an "employee" under ... Title VII ... because his relationship with the Bureau of Prisons, and therefore, with the defendants, arises out of his status as an inmate, not an employee. Although his relationship with defendants may contain some elements commonly present in an employment relationship, it arises " from [plaintiff's] having been convicted and sentenced to imprisonment in the [defendants'] correctional institution. The primary purpose of their association [is] incarceration, not employment. " Prisoner Not Protected From Racial Job Bias, 2 Empl.Prac.Guide (CCH) 6865, at 7099 (April 18, 1986)(EEOC Decision No. 86-7). Since plaintiff has no employment relationship with defendants, he cannot pursue a claim for discrimination against them under ... Title VII.... *Id.* at 997.

***3** The court has studied the present record in light of this analysis and concludes there was no employment relationship between defendants Neve and Winkelbauer and plaintiff. Defendant Winkelbauer screened plaintiff's application for compliance in the course of her employment as a corrections officer, and defendant Neve issued the guidelines in his capacity as the Classification Administrator. All contact between plaintiff and defendant Winkelbauer arose from his status as an inmate assigned to her in her capacity as a Unit Team Manager. Thus, as in *Williams,* the primary

function of their association was the management of plaintiff's activity as a prisoner.

The court therefore concludes plaintiff cannot pursue claims against these defendants under Title VII and that their motion to dismiss must be granted.

Impact defendants

Defendants Greg Schaefer [FN1], Dave Menghini, and Joseph Menghini move for summary judgment. Defendant Schaefer was a supervisor at Impact from August 1996 to June 1999. Defendants Joseph and David Menghini are employed by Impact as Vice Presidents. These defendants seek summary judgment on the grounds that plaintiff is not an employee as defined by Title VII or the KAAD, that they are not proper parties under either provision, and that because plaintiff failed to exhaust administrative remedies, he may not proceed under the KAAD.

> FN1. Defendant Schaefer's name has been spelled "Schaffer" in some pleadings. Schaefer's attorney has provided the correct spelling, and this order uses that spelling.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the initial burden of showing there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1552 (10th Cir.1997).

If the moving party meets its initial burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by ... affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex*, 477 U.S. at 324 (quoting Fed.R.Civ.P. 56(e)). The non-moving party may not rest on bare allegations but instead must advance specific facts establishing a genuine issue for trial. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

The court first considers defendants' claim that they are not proper parties under Title VII or the Kansas Act Against Discrimination. It is settled in the Tenth Circuit that liability under Title VII liability is borne by employers and not by individual supervisors. "Under Title VII, suits against individuals must proceed in their official capacity; individual capacity suits are inappropriate." *Haynes v. Williams*, 88 F.3d 898, 899 (10th Cir.1996). *See also Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir.1993)(" 'The relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act.' ")(quoting *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir.1991)). The same reasoning applies with equal force to claims brought under the KAAD. *Davidson v. MAC Equipment*, 878 F.Supp. at 187-88.

***4** Plaintiff's complaint does not name Impact Design as a defendant. The complaint describes defendant Schaefer as "perform[ing] his duties as an individual in a private capacity as personnel supervisor of a private industry business operating on the grounds of a Kansas Correctional Facility." (Doc. 1, p. 1.) Each of the Menghini defendants is described as "acting in his private capacity as private employer and owner for and of Impact Design, Inc., (private close corporation) business for profit, operating on the grounds of a correctional facility." (Doc. 1, p. 2, pars.4-5.)

Thus, to the extent plaintiff proceeds against these individual defendants, he has failed to identify proper parties under Title VII.

Defendants next assert that plaintiff is not an employee as that term is defined by either Title VII or the KAAD.

It is settled in this Circuit that a prisoner employed in prison industries is not an "employee" under Title VII. *Williams v. Meese,* 926 F.2d at 997. The Tenth Circuit has also stated, in examining whether state prisoners were "employees" under the Fair Labor Standards Act, that "the economic reality test was not intended to apply to work performed in the prison by a prison inmate ." *Franks v. Oklahoma State Industries,* 7 F.3d 971, 973 (10th Cir.1993). Here, however, the court must consider whether this case law extends to the plaintiff, a prisoner who sought work in a private industry operated on prison premises.

It is uncontroverted that the Kansas Department of Corrections exerts considerable control over the assignment of inmates to Impact at LCF. The Department establishes the criteria for eligibility for assignment, screens applications for assignment to Impact, provides corrections officers who supervise inmates as needed, and is the direct recipient of Impact's payroll. The Department retains some funds from Impact's payroll for certain identified purposes, including victim restitution and reimbursement for public assistance provided to inmates' families; inmates receive only a $35.00 credit at the prison canteen. The Department may terminate a prisoner's assignment to Impact and may discipline a prisoner who terminates his assignment with Impact before completing one year. If a facility lockdown is necessary, the Department determines whether inmate workers may report to Impact during that time. These circumstances militate in favor of a finding that the plaintiff's assignment to Impact should be viewed no differently than the more traditional prison work assignments considered in *Williams v. Meese* and *Franks v. Oklahoma State Industries.*

The court also finds persuasive the case law developed by the courts which have considered, and rejected, the argument that prisoners assigned to private industry operating on prison premises may be viewed as employees under the Fair Labor Standards Act. *See Gilbreath v. Cutter Biological, Inc.,* 931 F.2d 1320, 1325-26 (9th Cir.1991) (inmates working in private plasma center inside prison were not covered by FLSA); *Alexander v. Sara, Inc.,* 721 F.2d 149, 150 (5th Cir.1983) (inmates working in private, for-profit laboratory inside prison were not covered by FLSA); and *Sims v. Parke Davis & Co.,* 334 F.Supp. 774, 782 (E.D.Mich.)(inmates working at private drug clinic inside prison were not covered), *aff'd,* 453 F.2d 1259 (6th Cir.1971), *cert. denied,* 405 U.S. 978 (1972). *Compare Watson v. Graves,* 909 F.2d 1549 (5th Cir.1990)(prisoners in work release programs working for private employers were employees entitled to minimum wage coverage under FLSA).

***5** Having considered the arguments made by the parties and the relevant case law, the court is persuaded that the degree of control exercised by the Department of Corrections in all aspects of the assignment of inmates to Impact at LCF outweighs those aspects of plaintiff's assignment to Impact which might suggest the existence of an employment relationship protected by Title VII. The court concludes plaintiff does not have standing to proceed as an "employee" as defined by Title VII.

Finally, this court need not reach the issue of whether plaintiff is an "employee" under KAAD, as it finds plaintiff has failed to properly exhaust administrative remedies. "Before a plaintiff may litigate any KAAD claims in court, plaintiff must first receive an unfavorable determination from the KHRC, file for reconsideration of that unfavorable determination and then receive a denial of the reconsideration application." *Davidson v. MAC Equipment Co.,* 878 F.Supp. 186, 189 (D.Kan.1995) (citation omitted); K.S.A. 44-1010("No cause of action arising out of any order or decision of the commission shall accrue in any court to any party unless such party shall petition for reconsideration as herein provided.") The record demonstrates the KHRC administratively closed plaintiff's case and that plaintiff failed to seek reconsideration of that decision.

Conclusion

For the reasons set forth, the court concludes the plaintiff is not entitled to proceed on his claims under Title VII and the KAAD. The court grants the pending motions to dismiss and for summary judgment and orders that this matter be dismissed

and all relief denied.

IT IS, THEREFORE, BY THE COURT ORDERED the motion to dismiss of defendants Neve and Winkelbauer (Doc. 50) is granted.

IT IS FURTHER ORDERED the motion for summary judgment of defendants Schaefer, Menghini, and Menghini (Doc. 53) is granted.

Copies of this order shall be transmitted to the parties.

IT IS SO ORDERED.

D.Kan.,2002.
Rhodes v. Schaefer
Not Reported in F.Supp.2d, 2002 WL 826471 (D.Kan.)

END OF DOCUMENT

Westlaw

42 F.3d 1406

42 F.3d 1406, 1994 WL 673060 (C.A.10 (N.M.))
(Cite as: 42 F.3d 1406)

NOTICE: THIS IS AN UNPUBLISHED OPINION.(The Court's decision is referenced in a " Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA10 Rule 36.3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Tenth Circuit.

Calvin PHILLIP, Plaintiff-Appellant,

v.

Eloy MONDRAGON, Secretary of Corrections; and Canteen Corporation, Defendants-Appellees.

No. 94-2141.

Nov. 30, 1994.

Before SEYMOUR, Chief Judge, McKAY and BALDOCK, Circuit Judges.

ORDER AND JUDGMENT 1

*1 After examining Appellant's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Mr. Phillip appeals the dismissal of his 42 U.S.C.1983 civil rights claim as frivolous under 28 U.S.C.1915(d). Mr. Phillip is an inmate in a New Mexico correctional facility. He has claimed that he has been and continues to be denied minimum wages for working for a private entity, Canteen Corporation, Inc., on prison grounds. The district court correctly stated that the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, does not normally apply to prisoners, *citing Franks v. Oklahoma State Indus.*, 7 F.3d 971 (10th Cir.1993). If Mr. Phillip were relying solely on the FLSA, we would agree that his claim should have been dismissed. However, Mr. Phillip has pleaded, albeit not artfully, other grounds for relief. Accordingly, we find his claim not to be frivolous, and we remand for further proceedings.

"[W]henever a plaintiff states an *arguable* claim for relief, dismissal for frivolousness under 1915(d) is improper, even if the legal basis underlying the claim ultimately proves incorrect." *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir.1991). Construing the pro se pleadings liberally, Mr. Phillip has made a colorable claim of an equal protection violation.

Although he failed to specify the state statute in his initial complaint, it is now clear that Mr. Phillip is basing his complaint on N.M. Stat. Ann. 33-8-13. Under this provision, the Corrections Department may allow "private enterprises" to operate on correctional facility grounds, provided that "the enterprise shall be deemed a private enterprise and subject to all laws governing the operation of similar private business enterprises." The only exception stated in the law is that the "provisions of the Unemployment Compensation Law shall not apply to inmate employees." Mr. Phillip argues that the Canteen Corporation is a "private enterprise " operating at the prison under the authority of 33-8-13. Accordingly, it should be subject to all laws governing the operation of private businesses, including minimum wage laws. Mr. Phillip has also alleged that there are at least five other private industries operating within the confines of New Mexico correctional facilities, all of which pay at least minimum wages for inmate labor. Assuming, arguendo, these facts to be true, Mr. Phillip has stated that he is being deprived of a property right (the right to earned and future minimum wages) by the state while other similarly situated inmates are not. We construe this as a claim of deprivation of equal protection of the laws. Even though the claim as pled would be judged under the rational basis test, it is sufficient to survive a frivolousness dismissal.

Mr. Phillip states that he requested and was denied

back wages. He did not elaborate on what procedure was used, but we note that he is not required to exhaust his state or administrative remedies before filing a 1983 claim. *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 500-01 (1982).

***2** This case seems to be ideal for a *Martinez* report pursuant to *Martinez v. Aaron*, 570 F.2d 317, 319 (10th Cir.1978). Such a report should seek to clarify if the Canteen Corporation is operating under the authority of 33-8-13 or some other provision of state law. The report should also attempt to determine if Mr. Phillip's allegations regarding other private enterprises operating on prison grounds are true, and, if they are, what justification the Department of Corrections has for exempting the Canteen Corporation from the minimum wage laws.

We reverse the dismissal of the petition, and remand to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

> FN1. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

C.A.10 (N.M.),1994.
Phillip v. Mondragon
42 F.3d 1406, 1994 WL 673060 (C.A.10 (N.M.))

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64 Fed.Appx. 120

64 Fed.Appx. 120, 2003 WL 1827802 (C.A.10 (Okla.))
(Cite as: 64 Fed.Appx. 120)

Briefs and Other Related Documents

This case was not selected for publication in the Federal ReporterThis case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. Tenth Circuit Rule 36.3. (FIND CTA10 Rule 36.3.)

United States Court of Appeals,Tenth Circuit.

Timothy Gordon BERRY, Plaintiff-Appellant,

v.

State of OKLAHOMA; Oklahoma Department of Corrections Director; James L. Saffle; Patrick Crawley; Norma Bullock; Anita Wooten; Wackenhut Corrections Corporation; Dayton J. Poppell, Defendants-Appellees,

and Scott Bighorse and Mary Wooten, Defendants.

No. 01-6281.

April 9, 2003.

State inmate brought § 1983 action against state, director of state corrections department, and other defendants, asserting, inter alia, claims for alleged violations of his constitutional rights. The United States District Court for the Western District of Oklahoma dismissed 15 of inmate's claims, pursuant to in forma pauperis statute, and transferred remaining claim to another district court. Inmate appealed. The Court of Appeals, Paul J. Kelly, Jr., Circuit Judge, held that: (1) district court entered final, appealable judgment, and (2) appeal, which was frivolous, counted as "prior occasion" or "strike " for purposes of in forma pauperis statute's three strikes provision.

Appeal dismissed.

West Headnotes

[1] **Federal Courts 170B ⇐589**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk585 Particular Judgments, Decrees or Orders, Finality
170Bk589 k. Dismissal and Nonsuit in General. Most Cited Cases

District court entered final, appealable judgment in inmate's § 1983 action, even though district court did not certify its judgment, when, in same order dismissing 15 of inmate's 16 claims, court transferred remaining claim to different district court and its intention to sever transferred claim was indicated by language transferring only "the claim raised in Count Three"; severance rendered certification of judgment dismissing other claims unnecessary. 28 U.S.C.A. § 1406(a); 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rules 21, 54(b), 28 U.S.C.A.

[2] **Federal Civil Procedure 170A ⇐2734**

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2732 Deposit or Security
170Ak2734 k. Forma Pauperis Proceedings. Most Cited Cases

Federal Courts 170B ⇐663

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk662 Proceedings in Forma Pauperis
170Bk663 k. Grounds for Permitting or Refusing. Most Cited Cases

Dismissal, as frivolous, of inmate's appeal from dismissal of his § 1983 claims under in forma pauperis statute counted as "prior occasion" or " strike" for purposes of in forma pauperis statute's three strikes provision, which imposed restrictions on civil actions or appeals brought by prisoners proceeding in forma pauperis. 28 U.S.C.A. §

64 Fed.Appx. 120

64 Fed.Appx. 120, 2003 WL 1827802 (C.A.10 (Okla.))
(Cite as: 64 Fed.Appx. 120)

1915(e)(2)(B)(i, ii), (g); 42 U.S.C.A. § 1983.

[3] **Federal Civil Procedure 170A ⇐2734**

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2732 Deposit or Security
170Ak2734 k. Forma Pauperis Proceedings. Most Cited Cases
Dismissal of inmate's § 1983 claims under provisions of in forma pauperis statute allowing for dismissal of frivolous, malicious, and insufficient claims counted as separate strike against inmate under three strikes provision of statute, which imposed restrictions on civil actions or appeals brought by prisoners proceeding in forma pauperis. 28 U.S.C.A. § 1915(e)(2)(B)(i, ii), (g); 42 U.S.C.A. § 1983.

***120** Timothy Gordon Berry, Holdenville, OK, for Plaintiff-Appellant.

Before SEYMOUR, KELLY and LUCERO, Circuit Judges.

ORDER AND JUDGMENT*

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

PAUL KELLY, JR., Circuit Judge.
****1** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

[1] Plaintiff Timothy Gordon Berry, a state prisoner appearing pro se, appeals the district court's order and the supporting judgment dismissing fifteen of the sixteen claims he asserted in his 42 U.S.C. § 1983 civil rights complaint. Our jurisdiction arises under 28 U.S.C. § 1291, and we conclude that the district court entered a final judgment that is appealable to this court even though the district court did not certify its judgment under Fed.R.Civ.P. 54(b). [FN1] Nonetheless, because Mr. Berry's appeal to this court is frivolous, we dismiss the appeal under 28 U.S.C. § 1915(e)(2)(B)(i).

FN1. With respect to Count Three in Mr. Berry's Complaint, the magistrate judge concluded that Mr. Berry had stated a claim against defendants Scott Bighorse and Mary Wooten based on his allegation that he was transferred to a private prison in retaliation for exercising his constitutional rights. The magistrate judge also concluded that venue over Count Three was not proper in the Western District of Oklahoma, and the magistrate judge recommended that the claim be transferred under 28 U.S.C. § 1406(a) to the Northern District of Oklahoma. The district judge adopted the magistrate judge's recommendation, and, in the same order dismissing the fifteen additional claims asserted by Mr. Berry, the district judge "transfer[red] the claim raised in Count Three ... to the ... Northern District of Oklahoma." R., Doc. 9 at 2. Although the district judge did not expressly sever Count Three under Fed.R.Civ.P. 21, we conclude that the district judge intended to sever Count Three as indicated by her language transferring only "the claim raised in Count Three." As a result of the severance, it was not necessary for the district judge to certify her judgment dismissing Mr. Berry's other claims under Rule 54(b), and this court has jurisdiction to hear this appeal without a Rule 54(b) certification.

In his complaint, Mr. Berry claimed that: (1) he was wrongfully terminated from his prison work assignment as a legal research assistant; (2) he was

not paid the federally mandated minimum hourly wage for work he performed in prison and was denied the opportunity to work for a wage; (3) he was punished and denied certain privileges for refusing to work for no compensation; (4) he was subjected to involuntary servitude in violation of the Thirteenth Amendment; (5) he was denied certain statutory earned credits and has therefore been subjected to a lengthier term of imprisonment; (6) the conditions of his confinement were unconstitutional; (7) certain rules and regulations and related administrative procedures of the Oklahoma Department of Corrections were unlawful; (8) an assistant attorney general of the State of Oklahoma misrepresented the controlling law and committed malpractice during a state-court habeas proceeding; and (9) he has been denied access to the courts.

After thoroughly analyzing each of Mr. Berry's claims in light of the governing legal authorities, the magistrate judge concluded that Mr. Berry had failed to state a claim on which relief may be granted and/or that his claims were frivolous. The magistrate judge therefore recommended ***122** to the district judge that Mr. Berry's claims be dismissed under § 1915(e)(2)(B)(i) and (ii), [FN2] and the district judge adopted the magistrate judge's recommendation and dismissed Mr. Berry's claims. The district judge also determined that the dismissal counts as a "prior occasion" or "strike" for purposes of the "three strikes" provision in § 1915(g). In addition, the district judge denied Mr. Berry's motion for leave to proceed on appeal in forma pauperis, concluding, under § 1915(a)(3), that this appeal was not taken in good faith.

FN2. As noted by the magistrate judge, filing restrictions have been imposed on Mr. Berry due to his extensive history of filing frivolous lawsuits in the Western District of Oklahoma. *See Berry v. Fields*, No. 94-6281, 1994 WL 697314 at *1 (10th Cir. Dec. 13, 1994) (unpublished). The magistrate judge concluded that Mr. Berry substantially complied with the filing restrictions, and she therefore examined the merits of his claims.

We review the district court's dismissal for failure to state a claim de novo. *See Gaines v. Stenseng*, 292 F.3d 1222, 1224 (10th Cir.2002). We review the district court's § 1915(e) frivolousness dismissal for an abuse of discretion. *See McWilliams v. Colorado*, 121 F.3d 573, 574-75 (10th Cir.1997). The standard of review is not determinative of this appeal, however, because we reach the same conclusions under either the de novo or the abuse-of-discretion standard of review.

***2** [2] [3] For substantially the same reasons set forth in the magistrate judge's report and recommendation dated May 10, 2001, *see* R., Doc. 6 at 7-24, we agree that Mr. Berry's claims are frivolous and/or fail to state a claim. We also agree with the district judge that this appeal was not taken in good faith. Accordingly, we deny Mr. Berry's motion under § 1915(a)(1) for leave to proceed on appeal in forma pauperis; we order Mr. Berry to render immediate payment of the unpaid balance due on the filing fee; and we dismiss this appeal as frivolous. Further, the dismissal of this appeal counts as a "prior occasion" or "strike" for purposes of the "three strikes" provision in § 1915(g). [FN3]

FN3. We note that Mr. Berry has two prior strikes in the Western District of Oklahoma based on the dismissals of his § 1983 complaints in Case Nos. 92-CV-174 and 94-CV-790. The district court's dismissal in this case also counts as a separate strike, giving Mr. Berry a present total of four strikes for purposes of § 1915(g) and any future civil actions he files in federal court.

This appeal is DISMISSED. We also DENY Mr. Berry's "Motion and Brief to Expand/Supplement the Record and for Leave to Amend/Supplement Pro Se Civil Rights Complaint," which he filed in this court on March 24, 2003.

C.A.10 (Okla.),2003.
Berry v. Oklahoma
64 Fed.Appx. 120, 2003 WL 1827802 (C.A.10 (Okla.))

64 Fed.Appx. 120, 2003 WL 1827802 (C.A.10 (Okla.))
(Cite as: 64 Fed.Appx. 120)

Briefs and Other Related Documents (Back to top)

• 01-6281 (Docket) (Jul. 30, 2001)

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